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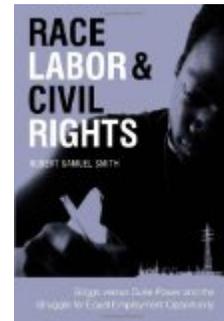
in the Humanities & Social Sciences

Robert Samuel Smith. *Race, Labor, & Civil Rights: Griggs Versus Duke Power and the Struggle for Equal Employment Opportunity*. Baton Rouge: Louisiana State University Press, 2008. x + 234 pp. \$37.50 (cloth), ISBN 978-0-8071-3363-7.

Reviewed by Christopher Schmidt (American Bar Foundation)

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The Story behind *Griggs v. Duke Power*

Last spring, in *Ricci v. DeStefano* (2009), the Supreme Court held that New Haven discriminated against white firefighters when the city decided not to use the results of a promotion test because it would have meant that no African Americans would have been promoted. New Haven acted out of fear of a possible lawsuit under Title VII of the 1964 Civil Rights Act, which limits the use of employment tests with racially disparate results—even when there is no evidence of racial bias in the test itself or in the employer’s decision to rely upon the test. But New Haven’s decision to throw out the test results, the Court held, put the city in violation of another provision of Title VII, which prohibits purposeful racial discrimination in hiring and promotion decisions. “Fear of litigation alone cannot justify an employer’s reliance on race to the detriment of individuals who passed the examinations and qualified for promotions,” explained Justice Anthony Kennedy, writing for the Court. Only if “the employer can demonstrate a strong basis in evidence” that its actions were necessary to avoid a “disparate impact” lawsuit, could such race-conscious decision making be used.

In creating this somewhat awkward but perhaps functional peace treaty between the disparate impact and disparate treatment requirements of Title VII, the Court avoided the most far-reaching legal claims put forth on behalf of the plaintiffs: that the effects-based disparate impact prong of Title VII violates the Equal Protection Clause of the Fourteenth Amendment. Justice Antonin

Scalia was unimpressed by Justice Kennedy’s avoidance dance. The Court’s decision, he warned in his concurring opinion, “merely postpones the evil day” when the Court will have to reconsider—and if Scalia has his way, strike down—the disparate impact doctrine. In the eyes of Scalia at least, there is a constitutional ticking time bomb at the very heart of one of our most venerable civil rights statutes.

The historical roots of this situation can be traced back to 1964, when Title VII was passed, but perhaps the more significant year was 1971, when the Supreme Court decided *Griggs v. Duke Power Co.* Title VII, as originally conceived and drafted, targeted intentional racial discrimination in employment decisions. *Griggs*, however, held that race-neutral employment tests could also violate Title VII, even without evidence of discriminatory intent.

The story of *Griggs* is the subject of a new book by Robert Samuel Smith, *Race, Labor, and Civil Rights: Griggs versus Duke Power and the Struggle for Equal Employment*. Smith describes his project as a “sociological history” of *Griggs* (p. 1), based on a commitment to the idea that social change comes from the bottom up. While a study revolving around a single Supreme Court decision may offer an awkward vehicle for this kind of claim, Smith makes the case that “grassroots legal activism compelled political officials and judges to offer expanded interpretations of Title 7” (p. 7). Embracing the recent

scholarly trend toward pressing the civil rights movement beyond the confines of the traditional 1954-1965 framework, Smith argues that the workers and lawyers at the center of his book, whose primary contributions came in the second half of the 1960s, represent a vital part of the movement's history that has not received enough attention. As he rightly emphasizes, once the great civil rights laws had been passed, there remained the struggle to figure out how they would be utilized as tools for social change. This study also squarely fits in a growing field of scholarship focused on workers' rights as an integral part of the civil rights movement.

At the heart of Smith's book is Willie Boyd, one of the plaintiffs in the *Griggs* suit. One of seventeen children born into a sharecropper family, raised working in the North Carolina tobacco fields, Boyd's story is remarkable and inspiring. Smith is at his best in portraying this man's life and times. Boyd's words, captured in an interview with the author, bring a valuable texture to the history Smith recounts. For example, Boyd's description of the life of a tobacco sharecropper in the Jim Crow South—"You got used to it, but you always wished you were having a better day" (p. 40)—is a pitch-perfect encapsulation of the frustration, resilience, and humanity that characterized this man's life experience. In the late 1940s, Boyd left the tobacco fields and moved to Reidsville, North Carolina, where he began working for the Duke Power Company, first helping to build the Dan River Station and then as a janitor at the newly constructed power plant.

Duke Power had a long history of discrimination against its African American employees. Prior to 1965, the company relegated blacks to the labor department, the lowest employment category. In response to the passage of Title VII, the company lifted this restriction, but it then introduced high school graduation and standardized testing requirements for employees who wanted promotions from the labor department. In this way, despite the withdrawal of its formal discrimination policy, Duke Power remained segregated in the years following the passage of Title VII. Race-neutral diploma and testing requirements combined with openly discriminatory hiring decisions made prior to Title VII to effectively replicate pre-Title VII work patterns.

Willie Boyd, an active member of his local NAACP, emerged as a leader among the African American workers at Duke Power. He tried, without success, to get management reconsider the new testing requirements. He and a coworker took the standardized test (which had nothing to do with the kind of work he hoped to

do), but failed. Boyd then turned to the federal Equal Employment Opportunity Commission (EEOC). But the EEOC was only empowered to investigate allegations and to initiate conciliation efforts, and neither proved effective at breaking down employment barriers at Duke Power. Finally, Boyd and a group of coworkers (including Willie Griggs, who was chosen as the lead plaintiff because he was the youngest and therefore had the most to potentially gain from a favorable ruling) went to the NAACP's Legal Defense and Educational Fund. The NAACP lawyers initiated the lawsuit that would eventually remake the landscape of employment discrimination law.

The second half of *Race, Labor, and Civil Rights* takes the *Griggs* suit through its various stages. Smith offers chapters on the NAACP lawyers who took the case and the legal strategy they put together; the case at the federal district court, where the plaintiffs lost; and finally, the case on appeal, in the Fourth Circuit Court of Appeals and then in the Supreme Court. By the time the Supreme Court heard the case, a disparate impact interpretation of Title VII, despite having little grounding in the legislative history, had developed a relatively solid legal foundation. The EEOC had issued a series of rulings based on this reading of Title VII, as had a number of lower federal courts. So when Chief Justice Warren Burger wrote for a unanimous Court in *Griggs*, much of the groundwork had already been laid—his contribution was one of consolidation more than innovation. Title VII, Burger explained, "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"—what might charitably be described as a questionable but not unreasonable reading of the statute. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." In the case of Duke Power, the Court found that neither the high school graduation requirement nor the standardized tests "bear a demonstrable relationship to successful performance of the jobs for which it was used." The Supreme Court thus gave an effects-based reading of Title VII its stamp of approval. Twenty years later, Congress did the same when, in the Civil Rights Act of 1991, Title VII was amended to explicitly include *Griggs*'s disparate impact requirement.

One of the most exceptional aspects of the history of *Griggs* was how unexceptional the case seemed at the time. It was a unanimous opinion that did not appear to have much behind-the-scenes drama. The great liberal mastermind of the era, Justice William Brennan, re-

cused himself from the case because as a young attorney he had represented Duke Power (although he did play a role in ensuring that the Court took the case). Thurgood Marshall, the civil rights warrior who now sat on the high court, gets only a passing mention in Smith's account. Burger was no great civil rights enthusiast, but he wanted to establish himself as the leader of the Court, so he read the way the wind was blowing and took the case for himself. Just as notably, the press gave the decision only routine summaries. *Griggs* was surely a product of courageous activism and committed lawyers, but it was also very much a product of its times.

Smith's book suffers from certain organizational choices. The chapters are roughly chronological, but there is a good deal of overlap between them, leading to some frustrating repetitiveness. Another organizational decision, using the Supreme Court's decision as the book's culmination point, would seem to run against Smith's interest in telling the story of *Griggs* as a sociolegal history. (Smith provides a brief concluding chapter on the aftermath of the decision, but the intention here is mostly to tie up some loose ends and assess the impact of the decision.) Where to start and end a historical narrative is of course a tricky decision, one that inevitably will make some readers dissatisfied. But ending with the Supreme Court's ruling seems a particularly bad fit for this book. From the perspective of the workers and lawyers who struggled to gain the victory in *Griggs*, the decision was a significant event, but certainly not a moment that marked a definitive end-point of one battle and the beginning of another. (Consider, for example, Nancy MacLean's comprehensive history of the struggle for worker equality during the long civil rights movement, *Freedom Is Not Enough: The Opening of the American Workplace* [2006]—a model of sociolegal history—in which *Griggs* merits a brief summary, but not much more.) *Griggs* offered a powerful tool for lawyers to dislodge entrenched segregation in the workplace, but the struggle for equal employment opportunity contin-

ued, reconfigured somewhat but hardly transformed. The same point that Smith makes regarding the Civil Rights Act of 1964—that its significance was largely realized in the subsequent struggle over its implementation—might also be said of the *Griggs* decision.

The central contribution of Smith's book is in drawing attention to the individuals who played important but largely forgotten roles in the history behind the *Griggs* case. Recovering the story of Willie Boyd (who eventually did secure his promotion, becoming the plant's first black supervisor) is a true service to the historical record. Smith's sketches of various other actors who played roles small and large in the history that led up to the Court's ruling are consistently interesting and informative. Smith is also particularly effectively at placing these figures into the context of North Carolina history.

Smith's book came out before the *Ricci* decision, so it does not discuss the doctrinal tensions within Title VII that may auger the demise of *Griggs*. The book nonetheless provides a useful perspective from which to view the dramatic shift in the Court's approach to civil rights law in recent years. To read Smith's account of *Griggs* is to be transported into an alternative judicial universe. Today, if *Ricci* is any indication of things to come, the Court appears to be moving toward a constitutional challenge to Title VII.[1] In 1971, by contrast, the Court was still considering the possibility of a *constitutional* disparate impact requirement. (*Washington v. Davis*, the decision that eventually rejected this path, came five years after *Griggs*.) In 1971, a unanimous Court could press beyond an ambiguous legislative record to find a disparate impact requirement in Title VII—and it all seemed business as usual.

Note

[1]. For a comprehensive analysis of this question in light of *Ricci*, see Richard Primus, "The Future of Disparate Impact," *Michigan Law Review* 108 (forthcoming, 2010).

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